SUPPORTING BRIEF OF PETITIONERS.

This is an application for a writ of certiorari for a review of the decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming an order of the National Labor Relations Board finding that the Petitioners had engaged and were engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the National Labor Relations Act, in failing to bargain collectively with a labor union following a consent election relative thereto, the validity of which is challenged by Petitioners, and whether upon such findings the Board's Order, requiring the Petitioners to cease and desist from their alleged unfair labor practices was valid and proper under the Act.

First Point.

Board Determines Unit: Those in Said Unit Must Not Be Excluded from Voting.

The Board must determine the unit for an election, and when once determined, those in that unit must not be excluded from voting.

In the case of *Northrop Corp.* v. *Madden*, 30 F. Sup. 993, the Court on page 994 held:

> "The complaint that the Board has excluded certain departments from participation and that such exclusion does not conform to the requirements of the Act that the Board designate the appropriate unit for the purpose of collective bargaining, if well taken, would affect the jurisdiction of the Board to call the election, and would be reviewable."

In the case of *Nashville C. & St. L. Ry.* v. *Railway Employees Dept.*, 93 F. (2d) 340, syllabus 5, the Court held:

> "Under Railway Labor Act defining 'employee' as every person in service of carrier * * * railroads

> furloughed employees * * * were 'employees' entitled to participate in election * * * P. 343—these (furloughed employees) 'have not only a future but a present interest in all negotiations which affect hours of labor, rates of pay and working conditions governing the craft in which they have long been schooled and disciplined'."

The Courts have heretofore held that there must be a fair opportunity for all members of the unit to vote, which was certainly not given in this case to the four employees in military service who obviously, in the absence of a mail ballot being sent to them, could have no opportunity to the vote, nor were the others who were sick on the day of the election and the others who by reason of change in their schedules were unable to appear at the polls during the hours that the polls were open, given a fair opportunity to vote. No procedure whatever was set up by the Board to provide a fair opportunity to these eligible voters to cast their ballots. To this effect, see *N. L. R. B.* vs. *Whittier Mills Co.*, 111 F. (2d) on page 474, where the Court says:[2]

> "*Where with fair opportunity to all members of the unit to vote,* a majority do vote, they are so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting, and suffices to select the bargaining representative of the unit." (Italics ours.)

In the case of *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 458, Justice Black said, in referring to Sec. 9 of the Act as vest-

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[2] An additional case holding that the agent must be selected by the majority of the employees is found in *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874. On page 886 the Court held: "*Where a union or other bargaining agent has been selected by a majority* of the employees * * * the employer's statutory duty is to bargain." (Italics ours.) In the case of *Marlin* v. *Rockwell Corp.* v. *N. L. R. B.*, 116 F. (2d) 586, the Court on page 587 held: "Only if the Board has acted arbitrarily, may its discretion in determining the appropriate unit be overridden by the Courts."

ing in the Board the power to select the method of determining what union, if any, employees desire as a bargaining agent, to this end, the Board

> "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

This opinion well shows the sweeping powers of the Board, and it need not sacrifice (in its laudable desire for speed) the right of *each* eligible employee of the unit involved to register his vote. Any such result is contrary to the letter and spirit of the Act and by reason thereof defeats the object for which the Act was passed. No true American will object to letting his brother who may be bearing arms at the moment, register his vote, merely because by so doing there may be a delay in securing the final results. In the case at bar, the Board failed to make arrangements to take a secret ballot of all eligible employees listed specifically in the consent agreement.

SECOND POINT.

The N. L. R. B. Failed to Make Provisions Enabling Absent Soldiers to Vote.

The refusal of the National Labor Relations Board to make adequate provision for soldiers to vote is founded on the alleged claim of impracticability; however, where, under the language of the statute the intent of Congress is plain, it is the duty of the Courts to apply the statute as it stands, even if the consequence is hardship or injustice, which is not present in the case at bar and which could not result from the circumstances here. We further contend that such action on the part of the Board is both arbitrary and capricious.

In the case of *Fur Workers Union Local #72* v. *Fur Workers Union* #21238, 105 F. (2d) 1, affirmed 308 U. S. 522, 84 L. E. D. 443, the Court held:

> "The Board apparently considers it a hardship for the civilian employees to be delayed in determining who shall be their representative. From the reading of the Act, it is plain that Congress considered that all employees of the unit determined by the Board should have the opportunity of self expression."

Where fair opportunity has been given to all eligible voters to vote, unless the bargaining agency is selected by a majority of the employees so eligible to vote, it has no authority.

In the case of *Pueblo Gas & Fuel Co.* v. *N. L. R. B.*, 118 F. (2d) 304, on page 307 the Court held:

> "The authority of the bargaining agency to represent the employees *must* be sought in the consent of the employees." (Italics ours.)

In the *Frank Bros. Co.* v. *N. L. R. B.*, recently decided by this Court, the Court held:

> "Syllabus 2 * * * a bargaining relationship *once rightfully established* must * * * be permitted to exist * * * U. S.-88 L. Ed. 773, decided 4-10-44. (Italics ours.)

The employer cannot be too careful in labor disputes in ascertaining who is the proper bargaining agent, lest he find himself in the dilemma thrust upon employer, Medo, as disclosed in the case of *Medo Supply Co.* v. *N. L. R. B.*—U. S.—88 L. Ed. 749, wherein he was found guilty of engaging in an unfair labor practice, because he negotiated with a committee who claimed to represent a majority of the employees. The employer is very apt to be between Scylla and Charybdis in his dealings with his employees in many

of the matters involved in the National Labor Relations Act.

While the Board is vested with great discretion in determining eligibility (*N. C. St. L. Ry.* v. *R. E. D.*, 93 F. (2d) 340, 344), nevertheless, when once it has determined who is eligible, to so conduct an election that a component part of those eligible are denied an opportunity to vote, is not in conformity with the provisions of the Act as laid down by the Congress. The Board did not carry out the consent agreement in that it failed to make fair and adequate provision for all eligible employees to vote.

THIRD POINT.

Regarding Claim that Regional Director's Position Is Analogous to that of an Arbitrator.

In the brief of Counsel for the National Labor Relations Board, filed in the Circuit Court of Appeals, much is made of the fact that the conduct of this election was left to the sole discretion of the Regional Director and his decision was in the nature of that of an arbitrator and was to be final. The said Court also in its opinion, quoted with approval the same cases cited in the brief aforesaid (p. 758 of Opinion). However, an arbitrator is required to give effect to the instrument of submission (consent election agreement in the case at bar). If he does not, the arbitration will be set aside.

> * * * "These stipulations, by which part of the partnership assets is disposed of, are, in legal effect, incorporated into the submission, and limit the authority of the arbitrator. He could do nothing to alter or affect them. * * * The radical error of the arbitrator seems to have been, that he disregarded these arrangements of the parties * * *".
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> *McCormick* v. *Gray*, 13 Howard (U. S.) 26, 14 L. Ed. 36 also cited in 3 Am. Jr. 971.

The act of the Regional Director, in failing to conduct this election so that all the eligible employees had a reasonable opportunity to vote, did not give effect to the consent agreement and certainly was in derogation of the rights of the thirty individuals who cast votes against the Union. Where there was such a large percentage against the Union (there being only an alleged majority of two), the Regional Director should have been particularly meticulous in seeing that every eligible voter had a reasonable opportunity to cast his ballot. While the consent agreement provided that the Board would conduct an election among all employees listed in such agreement, the election as conducted by the Board omitted a large part of such eligible employees.

FOURTH POINT.

Re Nolan's Vote.

In the record (R. 120) it is also strongly argued that the Petitioners were too late in challenging Nolan's right to vote. The fact remains, however, that the Petitioners were given five days' time under the terms of the consent election agreement in which to file a protest and it was during that time that the protest was so filed; hence, Petitioners objected seasonably and are in no way estopped from raising the questions presented here.

In contending that Nolan's vote should be and was properly counted, the Board takes the inconsistent position of standing on the "Consent Election Agreement" and at the same time asking the Court to disregard the provision of such agreement (R. 130) that expressly states an election shall be conducted among *all employees* in the Unit who were employed by Respondents during the pay-roll period ending July 31, 1942. We contend that the sound and well considered logic of the Trial Examiner's reasoning is ap-

parent when, in his "Intermediate Report" (R. 33-34), he said:

> "The Agreement for Consent Election stated distinctly that an election would be conducted among all employees in the unit who were employed by the respondent during the pay period ending July 31, 1942. The undersigned finds that this provision of the agreement takes precedence over the erroneous eligibility list which was attached to the agreement * * * It is also to be presumed that when the Union and the Respondents agreed on the eligibility date of July 31, it was for the purpose of excluding from the balloting any bus drivers employed subsequent to that date. The fact that Nolan's name appeared on the voting schedule and that he was actually a bus driver at the time of the election does not alone render him eligible to vote."

If Nolan, who was employed as a bus driver by the Company on August 8, 1942 (R. 176) was properly permitted to vote, then all other drivers employed during the period from July 31, 1942 to September 2, 1942, should also have been permitted to vote before the result of the balloting is truly and fairly representative and the order of the Board designating a bargaining agency can be said to be made in the light of the freely and frankly expressed wish of a majority of the employees as required by law.

In the case of *N. L. R. B.* v. *Automotive Maintenance Machine Co.*, 116 F (2d) 350, the Circuit Court of Appeals held as follows:

> "An order of the Board designating a bargaining agency must be made in the light of the freely and frankly expressed wish of the majority of the employees as to Union preference."

The situation which arose, when the Board's attention had been called to the Nolan vote, was quite a simple one inasmuch as his name on the list of eligible voters was merely a

clerical mistake. It is quite analogous to the case of *Moffett Hodgkins & Clark Co.* v. *Rochester,* 178 U. S. 373, 44 L. Ed. 1108, decided by this Court in an opinion written by Justice McKenna and published on May 21, 1900. The suit grew out of errors in the proposals of a firm of contractors for the execution of certain improvements conducted by the City of Rochester, N. Y.

One of the errors consisted in a charge for excavating 2000 cubic yards. The firm intended to bid $15.00 per cubic yard; however, a clerk by mistake inserted $1.50 per cubic yard. In addition, there were other mistakes not necessary to mention.

Before the acceptance of the bid (and in the case at bar, during the 5 days allowed to protest under the consent election agreement) the attention of the city was called to the errors.

The city contended that it was impelled by the commands of its charter to accept the bid. (In the case at bar, the N. L. R. B. contended that in following the Act, it could not throw out Nolan's vote).

The Circuit Court of Appeals in the *Moffett* Case supra, in deciding for the city and against the contractors, held that the position taken by the contractors

> "was well calculated to excite distrust on the part of the Board and induce its members to believe that the alleged mistakes were an *afterthought,* conceived when the complainants had become convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed". (Italics ours)

(In the case at bar the N. L. R. B. took the position

> "It would be * * * improper for the Regional Director * * * to overturn the election on a ground which only a hindsight sharpened by an adverse

result belatedly applied". See N. L. R. B. Brief in C. C. A., page 25.

and the Circuit Court of Appeals decided that it was not a super-canvassing Board.)

However, in the *Moffett* Case supra, this Court said (page 387):

"We are unable to concur in either of these conclusions"

and proceeded to relieve the contractors from all liability on a $90,000.00 surety bond which they had signed.

This Court, in the *Moffett* Case supra, quoted with approval from the opinion of Justice Swayne in *Hearne* v. *Marine Ins. Co.*, 20 Wall 488, 22 L. Ed. 395, where the Justice in speaking of the power of the courts to give relief says:

> "The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred."

In the case at bar *only* those employees who were employees July 31, 1942 were eligible to vote and through a clerical mistake, Nolan's name was inadvertently inserted, even though he was not employed by the Company on that date. While the National Labor Relations Act requires the Court to sustain the acts of the N. L. R. B. when sustained by evidence, nevertheless, the Board must proceed according to law. The question of Nolan's vote is a question of law. Although he was on the list, his being placed there was an act of inadvertence, which is not denied in the record. As the Trial Examiner pointed out, two wrongs do not make a

right (R. 34). When the attention of the Board was called to the fact that he had voted although ineligible to vote, there were several steps which the Board could have taken. It could have ascertained how Nolan voted and reduced the number of votes so cast by one; it could also have permitted those who were denied an opportunity to vote to cast a ballot or it could have thrown out the election and ordered a new one to be held. Instead the Board chose to affirm an invalid election, thereby penalizing the employee negative voters for the mistake of the clerk of Petitioners in inadvertently placing Nolan's name on the list of eligible voters. This was particularly unfair on the part of the Board. It should be remembered that the form of consent election agreement used in this case was prepared by the Board (R. 22, 23). Such being the case, it is elementary that in the event of any inconsistency, a construction should be placed on the contract favorable to the side which merely signed, but did not prepare the agreement.

In the Intermediate Report of Examiner Webb, he pointed out, (R. 36):

> "If Nolan voted for the Union, the result would be 31 ballots for the Union and 31 against the Union. * * * In view of the doubt, in respect to Nolan's vote, the undersigned is unable to find * * * that the Union, as a result of the consent election * * * represented a majority of the employees in the unit agreed upon by the parties * * *"

Section 9 (a) of the Act provides:

> "Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees * * *." (Italics ours.)

The Board refused to pass on the question as to the improper challenge of the vote of Thomas, who had cast his

ballot against the Union. Simple justice in determining the will of the majority in this case requires the giving effect of Thomas' vote and disregarding the ineligible Nolan vote which decisively affect the result of the election and disclose an evenly divided unit of employees wherein the Union does not have the required majority. The Board, nevertheless, by its order insists that the Union shall represent the employees as bargaining agent, notwithstanding the serious questions presented here.

If Petitioners are properly subject to any charge by the Board, it is conceivable that such would be that Petitioners had leaned over backward in remaining scrupulously aloof from its employees in the pre-election procedures and in insisting that the rights of all eligible voters be given proper consideration in this important matter; however, the propriety, indeed the necessity, of the course of conduct pursued by the employer in this case is well illustrated by the decision of this Court in the *Medo* case supra, wherein the Court makes plain the obligation upon the employer not to negotiate or bargain collectively with any employee representatives unless they be properly selected as the duly constituted bargaining agency. The following is quoted from page 752 of the opinion:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see Sec. 9 (a) of the Act, 29 U. S. C. A. Sec. 159 (a), 9 F. C. A. title 29, Sec. 159 (a), it exacts 'the negative duty to treat with no other'."

Summation.

The Board did not make proper arrangements to carry out its agreement to conduct an election among all eligible employees although the Board conducts thousands of elections each year. From this vast experience, there seems

to be no valid reason why omission was made by the Board to take care of situations as herein presented. Failure to make such provision can well have the effect of permitting small, but highly vocal minorities to control such elections.

The rule of the National Labor Relations Board, under which the votes of employees specifically eligible to vote, presently serving in the armed services of the United States are not taken by mail ballot (certainly the only feasible method of obtaining the same), is most unjust to our fighting men and we submit, not permitted under the provisions of the election agreement in the case at bar. The reason advanced by the Board that such method would cause undue delay, blatantly ignores the soldiers' rights. To disfranchise the soldier (because of the short delay that may result in securing his vote by mail) in the determination of the bargaining agent is not in accordance with our idea of Anglo-Saxon justice and is manifestly an unjust discrimination against those directly engaged in the war, whose rights it is the plain duty of the Courts to protect, especially during the period of their absence. It is also contrary to the expressed principles of the Commander in Chief of the armed forces,[3] as well as being violative of Section 9 (a) of the National Labor Relations Act and contrary to the spirit of the Soldiers' & Sailors' Relief Act. The principles involved and the effect on the soldier individually in the labor elections in many cases are even more important to him than is the result of a political election. Hence, a rule which disfranchises these men is most unfair, capricious and arbitrary, richly meriting the condemnation of this Court.

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[3] In his message returning the bill to the Congress permitting absentee soldiers to vote, President Roosevelt called the bill as finally passed, "a fraud on the soldiers and sailors and marines * * * upon the American people because of the way in which it tended to disfranchise the soldier. No State or Federal red tape should take from our young folk in the service their right to vote".

Conclusion.

We believe that we have clearly demonstrated in our petition and this supporting brief, need for the review by this Honorable Court of the action of the National Labor Relations Board in the election in this case, where its Regional Director counted the vote of a man not eligible to vote, threw out the vote of one eligible to vote and failed to make fair and adequate provisions for a large percentage of eligible employees to vote.

The essence of the Act is to ascertain the wishes of the majority of the employees. If, by reason of unforseen contingencies, it becomes necessary to so arrange transportation schedules that it is impossible for men to work and at the same time vote; if men becoming ill find that no arrangements whatever are made for them to vote; if soldiers in the service are denied the right to vote because of their being in the service; then the proceedings are a delusion and a snare for they defeat the very objective of the Act, to-wit: the determination of the will of the majority of the employees as to an agency for collective bargaining.

In conclusion, we respectfully submit that the Circuit Court of Appeals has decided important questions of federal law in this case which have not been, but should be, settled by this Court.

Respectfully submitted,

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